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No. 00-454

In the

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, and ELROY DRAKE, Members of the Navajo Tax Commission; and STEVEN C. BEGAY, Executive Director of the Navajo Tax Commission,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF ROBERTA BUGENIG, JAMES D. THOMPSON, JULIA R. THOMPSON, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. May an Indian tribe tax activity on land which is held in fee simple by nonIndians and which was entirely outside of the reservation until the reservation's boundaries were extended so that they now surround it?

2. May Congress delegate to a tribe regulatory authority over property that is held in fee simple and was clearly subject to state jurisdiction at the time the property was enveloped by an expansion of the reservation's boundaries?

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IDENTITY AND INTEREST OF AMICI[1]

Pursuant to Supreme Court Rule 37.3, written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

For more than two decades, Pacific Legal Foundation has litigated in support of property rights and individuals adversely affected by government tax and regulatory actions.

The Foundation's focus has come to include the tax and regulatory authority asserted by Indian tribes over nonIndian-owned fee property located within the exterior boundaries of Indian reservations.

Foundation attorneys, for instance, are representing Amici James D. and Julia R. Thompson and the Custer Battlefield Trading Company in *Thompson v. Adams*, Montana District Court No. 98-110. This litigation challenges a 4% "resort tax" that the Crow Indian Tribe imposed on gross receipts of a nonIndian business located on nonIndian fee land within the tribal reservation's exterior boundaries. The district court ruled in favor of the Thompsons, and the case is pending before the Ninth Circuit Court of Appeals.

In the case of *Bugenig v. Hoopa Valley Tribe*, 2000 U.S. App. LEXIS 24746 (9th Cir. 2000), Foundation attorneys represent Amicus Mrs. Roberta Bugenig in challenging the Hoopa Valley Indian Tribe's claim of regulatory jurisdiction over timber harvesting activity on Mrs. Bugenig's fee property.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae Pacific Legal Foundation, Roberta Bugenig, James D. and Julia R. Thompson, and the Custer Battlefield Trading Company affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

The case under review implicates issues central to both the *Bugenig* and *Thompson* litigation.

SUMMARY OF ARGUMENT

Reversal of the ruling below is called for because that ruling wrongly disregards the special status, within Indian reservations, of property held in fee simple. Such property cannot be willy-nilly subjected to a tribe's regulatory and taxing authority without subverting the authority of the state and, indeed, without doing violence to traditional understandings of what fee simple ownership entails.

The very concept of fee ownership of property creates a strong presumption that nonIndian-owned property that is held in fee is not subject to tribal taxation, even when it lies within the outer boundaries of an Indian reservation. Thus, this Court has recognized that state jurisdiction supplants tribal jurisdiction on formerly tribal properties that were privatized through the allotment process. How much stronger is the presumption of state jurisdiction where the property that is held in fee was never tribal property to begin with?

When considering whether a tribe has acquired regulatory authority over fee simple property within its exterior boundaries, it is important to recognize the limits on congressional power to declare such a thing so, especially where the United States did not originally hold jurisdiction over the property or activity that is now claimed to be under tribal sway. An act of Congress cannot transfer jurisdiction over fee property to an Indian tribe, where Congress did not itself have jurisdiction over that property. To say the same thing, Congress may not make such a transfer where it was a state that held jurisdiction. Indeed, in the instances discussed by this Court where Indian tribes have received express congressional

delegation of authority over property, states were not divested of jurisdiction because the tribe's authority had already been recognized by a treaty that preceded the admission of the state to the Union.

A too-casual acceptance of claims of congressional delegation not only undermines state sovereignty; it also potentially conflicts with recent court rulings that have stressed the constitutional guardrails to congressional transfers of various aspects of governmental authority.

For these reasons, Amici respectfully submit that this Court should deny Respondents' claim of regulatory authority over Petitioner's nonIndian guests.

ARGUMENT

I

THE COURT BELOW GAVE INSUFFICIENT WEIGHT TO THE FACT THAT PETITIONER'S LAND IS FEE SIMPLE PROPERTY

There is no question that the fee land owned by the Atkinson Trading Company is fee simple property. *See* Petitioner's Appendix at 2a. Indeed, its status as fee property antedates its inclusion within the exterior boundaries of the Navajo Reservation. It was made an inholding in the reservation as a result of a congressional expansion of the reservation boundaries. *Atkinson Trading Company, Inc. v. Shirley*, 210 F.3d 1247, 1265 (10th Cir. 2000) (Briscoe, J., dissenting). *See* Act of Congress of June 14, 1934, ch. 521, 48 Stat. 960, 961.

The significance of this fact is discounted by the court below. *See Atkinson*, 210 F.3d at 1261: "Our reading of Supreme Court precedent rejects the arbitrary factual basis of fee status as the determinative factor" as to whether the tribe has jurisdiction to impose a tax on an enterprise or activities within its exterior boundaries. The Court proceeds to posit an

alternative analytical framework which applies, apparently, irrespective of the fee status in question–namely a "balancing test" in which "the impact of the [nonmembers'] activity on the tribe [is balanced] with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction." *Id.* at 1267-68.

In fact, however, fee status is a crucial determinant under this Court's precedents. In *Montana v. United States*, 450 U.S. 544, 557 (1981), the Court was considering the "power of the [Crow Tribe of Montana] to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." In *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997), the issue was claims against "nonmembers arising out of accidents on state highways" running through Indian reservations. In both *Montana*, 450 U.S. at 557, and *Strate*, 520 U.S. at 454, this Court indicated it would have analyzed these tribal jurisdiction questions differently if they had involved conduct by nonmembers on tribal land and not merely within tribal boundaries.

In *Strate*, 520 U.S. at 446, this Court affirmed its rule that where no treaty or statute indicates otherwise, the tribe is *presumed to lack civil authority* over nonIndian lands within its reservation boundaries—absent the narrow exceptions laid down in *Montana*. Thus, it is the status of the land—not any "balancing test"—that is the crucial determinant as to who has authority, and where the land is held in fee—as in the case at bar—the presumption is against tribal authority.

A. The Strong Presumption That NonIndian-Owned Fee Simple Property Is Not Subject to Tribal Taxation or Regulation Can Be Traced to the History, Nature, and Status of Fee Simple Property

The primacy of state authority—as opposed to tribal authority—when it comes to property owned in fee within the boundaries of Indian reservations is exemplified in the

properties that become private as a result of the General Allotment Act of 1887, 24 Stat. 390 (1887), 25 U.S.C. § 331, *et seq.* Indeed, assimilation into general society–and the dissolving of tribal society and authority–were the precise aims of allotment policy.

> A period of twenty-five years was established during which the Indian owner was expected to learn proper business methods; at the end of this time the land, free of restrictions against sale, was to be delivered to the allottee. With a free and clear title the Indian became a citizen and came under the jurisdiction of the state in which he or she resided . . . . Private property, [federal officials] believed, [would lead] people directly to a "civilized" state.

Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice*, at 9 (University of Texas Press, Austin 1983).

Because the aim and result of the Allotment Act was to diminish tribal jurisdiction over fee lands, this Court has recognized that it is logically consistent, under the Allotment scheme, for state jurisdiction to supplant tribal authority on those properties:

> It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Montana, 450 U.S. at 559 n.9; *quoted in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 423 (1989) (plurality opinion).

To be sure, Congress ultimately repealed the Allotment Act, but the jurisdictional changes that the act had effected were not reversed.

While this Court has recognized limits on state jurisdiction over Indians residing on fee lands within reservations–*see, e.g.*, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), disallowing certain direct state taxes on Indian residents of a reservation–state regulatory jurisdiction over fee lands themselves has been upheld. For instance, this Court has approved real estate taxes on fee lands within reservations as consistent with the Allotment Act, whether the owners of the property are Indians or nonIndians, because the jurisdiction is in rem rather than in personam. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian*, 502 U.S. 251, 264-65 (1992).

If the presumption of state jurisdiction over property that was privatized through allotment is so strong, how much more powerful is the presumption as it attaches to property that was never tribal property to begin with? Such is the Atkinson property, which is fee property that was brought within the reservation boundaries only when those boundaries were expanded by Congress in 1934. *Atkinson*, 210 F.3d at 1265 (Brisco, J., dissenting).

Indeed, the very language of the Act expanding the tribe's boundaries gives rise to a presumption that Congress was not assuming, curtailing, or delegating existing jurisdictions over any fee property: "All valid rights and claims initiated under the public land laws prior to approval hereof involving any lands within the [areas added to the Navajo Reservation under the act], shall not be affected by this Act." 48 Stat. 961 (1934). If Congress intended to be in any way altering jurisdiction over "valid rights" on property that would henceforth lie within the reservation's boundaries, Congress could hardly have stated in such a categorical way that those rights would remain "unaltered." Indeed, at the very essence of this case is the acknowledgment that the extent and shape of rights on terrain within Indian reservations depends on who holds jurisdiction over that terrain.

B. An Act of Congress, Such as That Which Expanded the Navajo Reservation's Boundaries, Cannot Extinquish the Presumption of State Jurisdiction over Fee Simple Property

In 1934, the year the Atkinson property was brought within the boundaries of the Navajo Reservation by a congressional act expanding those boundaries, 210 F.3d at 1265, Arizona was already a state. Therefore, the Atkinson property was already under state jurisdiction at the point it became an inholding within the Navajo Reservation.

This fact defeats an argument that the Atkinson land might have been transferred to tribal jurisdiction through the act of Congress that brought it within the tribe's borders.

Indeed, the very act by which Congress expanded tribal boundaries creates a presumption that existing jurisdiction over fee property was not being disrupted. *Id.*

Indeed, a congressional transfer of jurisdiction of the Atkinson property could not have taken place because jurisdiction over the Atkinson land was not Congress' to delegate. The property came under the state's jurisdiction. The jurisdiction of a state, after all, "is co-extensive with its territory; co-extensive with its legislative power." *United States v. Bevans*, 16 U.S. 336, 387 (1818).

The primacy of the state–and the fact, consequently, that jurisdiction was not transferred to the reservation–is underscored by reviewing cases where Congress has been found to have invested a tribe with jurisdiction over a particular activity on fee property. In such cases, states have not been divested of jurisdiction because the states in these cases did not have jurisdiction to begin with.

In *Montana*, for instance, this Court noted that Indian tribal sovereignty over nonmembers "cannot survive without express congressional delegation." 450 U.S. at 564. But the

instances that this Court discussed where express congressional delegation had taken place involved circumstances where a tribe's jurisdiction was recognized before the particular state became a state. *Id.* at 552-53. The Court referred, for instance, to the Chippewa Treaty of 1854 (adopted before Minnesota became a state), and the Crow Treaty of 1851 (adopted before Montana's statehood). *Id.* In neither case was there an attempt to divest a state of existing regulatory jurisdiction over fee property.

Nor does the case under review involve activity over which the federal government had jurisdiction that it could delegate. While Congress does have power under Article I, section 8, to "regulate Commerce . . . with the Indian Tribes," the commerce on the Atkinson property to which the challenged taxation applies is commerce between a nonIndian property owner (*Atkinson*, 210 F.3d at 1249) and, to a great extent if not exclusively, the owner's nonIndian guests. *Id.* at 1270 (Briscoe, J., dissenting).

Do the transactions of nonIndian guests, on nonIndian-owned land, at the nonIndian-owned Atkinson hotel, restaurant, and other enterprises, still have a ripple effect that transforms them into commerce with "Indian Tribes" as understood by the Indian Commerce Clause? Perhaps under an "aggregation" analysis such a tenuous connection might be plausible, but this Court's precedents do not favor such extrapolation as a means of justifying claims of jurisdiction over activity on fee land in reservations. Specifically, under the second "exception" in the *Montana* analysis, 450 U.S. at 566, this Court requires that nonmembers' activity on alienated land have "direct effect" on a tribe's economic security, health, or welfare in order to justify tribal jurisdiction. "We do not doubt the truth of John Donne's observation that 'no man is an island.' . . . However, the Supreme Court has declined to employ this logic in conjunction with the second Montana exception." *Burlington Northern Railroad Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999)

(citing *Strate v. A-1 Contractors*, 520 U.S. 438, 458-59 (1997)). The aggregation approach is no more justified as a means of discovering "commerce . . . with" an Indian tribe based on transactions between a nonIndian enterprise on nonIndian-owned land and nonIndian customers.

Moreover, Congress has made no assertion of authority over the commerce on Atkinson's property. Quite the opposite:

> The statute expanding the reservation's boundaries explicitly disclaimed any disruption of pre-existing "rights and claims" on lands thus brought within the reservation borders.

48 Stat. 960, 961 (1936).

While Congress could transfer to a tribe, say, the regulation of liquor sales in Indian Country (*United States v. Mazurie*, 419 U.S. 544, 547 (1983)), such sales, unlike the activity on the Atkinson property, have always been squarely within the ambit of the Indian Commerce Clause and subject to congressional bans since at least 1832. *Rice v. Rehner*, 463 U.S. 713, 722 (1983).

Congress cannot take regulatory jurisdiction that it never had and then delegate that authority to a tribe.

C. Recognizing a Congressional Delegation of Regulatory Authority in this Case Would Conflict with Clear Constitutional Precepts

The Tenth Amendment to the United States Constitution states that "[t]he powers not delegated to the United States . . . are reserved to the States." A healthy respect for state prerogatives mandates caution when considering whether the United States Constitution countenances the federal government transferring to a tribe state regulatory jurisdiction over nonIndian land.

Likewise, federal delegation of regulatory power over nonIndians' *activity* on nonIndian-owned fee property is also constitutionally problematic, to say the least, where, as in this case, it was the state, not the federal government, that had jurisdiction over that property even before it was brought within the borders of the reservation. It should be noted that in recent years courts have applied increasing scrutiny to purported delegations of congressional authority. In *Printz v. United States*, 521 U.S. 898, 923-24 (1997), for instance, this Court struck down a federal administrative mandate on state officials not only because it subverted state autonomy but also because it impermissibly transferred federal executive branch authority to "thousands of [local law-enforcement officials] without meaningful Presidential control." *Id.* This Court, recognized that "the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."

Clearly, this Court has recognized clear constitutional guardrails to congressional transfers of authority. In the case at bar, it would be the State of Arizona's prerogatives that would be usurped by any assertion that Congress could delegate regulatory authority over the Atkinson property, because that property is and always has been subject to state jurisdiction.

Even where the federal government does have an original jurisdiction, this Court has found that, for a delegation of such authority to an Indian tribe to be lawful, the receiving entity must have independent sovereign authority to administer the delegated power. Thus, the Court noted in *Mazurie*, 419 U.S. at 556-67, that there are "limits on the authority of Congress to delegate its legislative power," but that those limits are "less stringent in cases where the entity exercising the delegated authority itself possess independent authority over the subject matter."

The Indian tribe in *Mazurie* possessed the requisite "attributes of sovereignty over both their members and their territory" that justified its receiving delegated authority over liquor sales by a bar within the reservation's boundaries. *Id.* at 557. But the transactions subject to tax challenged in the case at Bar are distinguishable. They are between a nonIndian property owner (*Atkinson*, 210 F.3d at 1249) and, to a great extent if not exclusively, the owner's nonIndian guests. *Id.* at 1270 (Briscoe, J., dissenting).

Petitioners in *Mazurie* had urged that because the party subject to regulation was not a member of the tribe and could not become a member of the tribe, the tribe could not be delegated regulatory power over the party's liquor sales. 419 U.S. at 557. This Court, *id.*, responded by citing precedent recognizing that tribal authority "could extend over nonIndians, insofar as concerned their transactions on a reservation with Indians." "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 558 (quoting *Williams v. Lee*, 358 U.S. 217 (1959)).

At least to the degree the transactions in the case on review are between nonIndians and other nonIndians–which may, indeed, be all or nearly all of the Atkinson transactions–they do not fall within precedent cited in *Mazurie* to recognize a tribal sovereignty over subject matter involving nonIndians.

Hence, not only does Congress lack power to delegate, whether the tribe has the clear independent sovereignty necessary to receive regulatory power in this context is in question.

CONCLUSION

For the above reasons, this Court should recognize that the Tribe does not have regulatory authority over Petitioner's nonIndian guests, and the ruling below should be reversed.

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Respectfully submitted,

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